

A NEW RIGHT OF ACTION:

Any Person Can Sue a Mandatary on Behalf of a Principal

By Evelyn L. Wilson

Act 356 of the 2014 Louisiana Legislature created a new right of action designed to protect the estates of persons who have appointed mandataries to handle their affairs when those mandataries abuse their powers. To assist principals unable to supervise their mandataries, this new law allows any interested person to draw a court's attention to the abuse.

In July 2006, the Uniform Law Commission recommended for enactment a Uniform Power of Attorney Act. An AARP Public Policy Institute Research Report, titled "A Comparison of Current State Laws with the New Uniform Power of Attorney Act," disclosed that much of Louisiana's law on mandate already offered many of the protections recommended by the new uniform law. A glaring omission in state law is section 116 of the uniform law which allowed a list of nine categories of persons to "petition a court to construe a power of attorney or review an agent's conduct, and grant appropriate relief."¹

By House Resolution 113 of 2009, Rep. Tim Burns asked the Louisiana State Law Institute (the Law Institute) to “study and make recommendations relative to the implementation of safeguards for elderly persons executing powers of attorney and to report its findings to the legislature.” In response to this resolution, the Law Institute formed the Power of Attorney for the Elderly Committee with representatives from various interest groups in the areas of estate planning and elder abuse. After reviewing the uniform act, the AARP report and Louisiana’s laws on mandate, the committee proposed a new right of action to allow persons other than the principal to petition a court on the principal’s behalf.

A mandate, or power of attorney, is a contract between a principal and the principal’s mandatory.² In general, this device serves as an extraordinarily efficient tool for managing property as it allows principals to plan for their absence or possible incapacity by making arrangements for someone other than themselves to properly manage their affairs. Louisiana’s mandates are always “durable” in that they continue in effect even after the principal loses the capacity to act for himself.³

Louisiana’s law of mandate provides a host of protections for principals. A principal who does not expressly authorize a mandatory to alienate, acquire, encumber or lease immovable property,⁴ make or revoke an *inter vivos* donation, accept or renounce a succession, contract a loan, acknowledge or remit a debt, or become a surety, draw or endorse promissory notes and negotiable instruments, or enter into a compromise or refer a matter to arbitration⁵ will not be bound by the mandatory’s act. Unfortunately, a typical power of attorney form is drafted in broad strokes and waives these protections. Most mandates expressly authorize mandatories to perform all of these acts.

Under Louisiana’s laws, absent an agreement to the contrary, either the mandatory or the principal can terminate a mandate at any time. Although a mandatory is accountable to the principal and is bound to provide information and an accounting upon the request of the principal,⁶ a principal may become men-



tally or physically unable to demand or interpret an accounting. A principal who is unaware of the actions of a mandatory, or a principal who is deceived by or who fears a mandatory, may not act to protect his estate.

Thousands of reports of abuse, neglect and exploitation are received by the state Office of Elderly Protective Services (EPS) each year. Often the perpetrator is a trusted mandatory. The Louisiana Medicaid Fraud Control Unit (MFCU) of the Louisiana Attorney General’s Office investigates and prosecutes the crime of “Exploitation of the infirmed,” defined as “[t]he use of an infirmed person’s or aged person’s, or disabled adult’s power of attorney or guardianship for one’s own profit or advantage by means of fraudulent conduct, practices, or representations.”⁷ Sadly, in many cases, by the time these investigations are complete, the principal’s property cannot be recovered.

Louisiana’s law of mandate neither contemplates nor provides for the oversight of a mandatory when the principal can no longer direct the mandatory. This new legislation allows a third party to bring suit on behalf of the principal to

call the mandatory to task. Importantly, it allows any interested person to ask a court to enjoin a mandatory from disposing of the principal’s assets pending a review by the court; that is, it allows injunctive relief without a finding of irreparable harm to, as it is said, stop the bleeding.

The petition filed in this action must name both the principal and the mandatory as defendants, and may name any other person the plaintiff believes has improperly received property that belonged to the principal. Naming these other persons as defendants allows a court to order the return of the principal’s property.

The pleading must be verified and must state with particularity the reasons the plaintiff believes court action is needed, thus creating a heightened pleading standard designed to discourage frivolous lawsuits. Members of the committee expressed concern that the children of a principal would use this action to obtain financial information the principal chooses to keep secret. A principal’s children have no right to access their parent’s financial data and a mandatory has no duty to account to anyone other than the principal, absent some evidence of abuse.

Significantly, the new statute applies only when the principal is a natural person. It does not impact other uses of a mandate or power of attorney.

To ensure that the principal has actual notice of the suit and of the allegations of wrongdoing on the part of the mandatory, the principal must be personally served. This provision resulted from concerns that the mandatory would want to hide his or her behavior from the principal and might make an appearance on behalf of the principal without the principal's knowledge or consent. Notifying the principal personally of the accusations against the mandatory may be enough by itself to spur the principal to address the concerns raised in the pleading. Conversely, a principal who knows of the litigation may choose to file a motion to dismiss it, taking sides with the mandatory rather than with the plaintiff.

When a principal files a motion to dismiss the action, the principal must appear in person or appear electronically to allow the court to assess the principal's supervision of the mandatory. During the court's hearing on the motion, the court must determine whether the principal is aware of the acts of the mandatory, whether the principal is subject to fraud, duress or undue influence, and whether the principal is able to comprehend generally the nature and consequences of the acts of the mandatory before granting the principal's motion to dismiss. These standards were derived from existing Civil Code articles 1477 through 1479 concerning the capacity of a person of the age of majority to make a donation.

When a principal is aware of the acts of the mandatory, is not subject to fraud, duress or undue influence, and is able to comprehend the mandatory's acts, the court is required to grant the principal's motion to dismiss. Otherwise, the court is expected to address the allegations in the petition using existing law applicable to the principal-mandatory relationship. The court can grant any relief to which the principal is entitled. This legislation does not create new standards of behavior for a mandatory; it creates new opportunities for enforcing the standards that already exist.

To assist a court in reaching its decision, this legislation expressly authorizes a court to appoint an investigator and to collect information from financial institutions and health care providers without meeting the strict notice and hearing requirements established to protect the privacy of those records. A court may enjoin a mandatory from exercising all or some of the powers granted by the mandate and may appoint an interim mandatory pending its decision.

The legislation allows a court to assess reasonable costs and attorney fees — another provision intended to discourage frivolous suits. In doing so, this new right of action seeks to protect a principal from serious abuse while protecting a mandatory, who may be working without compensation, from having to respond to the minor complaints of disgruntled siblings who may demand an accounting just to see what the mandatory is doing. The new law seeks to honor the principal's right to the privacy of his affairs while at the same time provide more vulnerable principals with some opportunity for relief.

Two additional procedural rules should be highlighted. Venue is set with a preference for the parish of domicile. The second venue choice, residence, is to be used when the principal has no domicile in the state. The third choices, in the absence of a domicile or a residence, are physical presence or where immovable property is located.⁸

To address concerns about issue preclusion and prescription should the principal die or become interdicted while litigation under this act is pending, the rules of substitution allow the action to continue even after the mandate ends. Successors may be substituted for the plaintiff after a principal's death and a curator may be substituted after interdiction.⁹

In addition to adding this new section to the law of mandate, this legislation amended Civil Code article 3029 on termination by the mandatory. Under current law, a mandate will terminate when the mandatory gives notice to the principal that the mandatory resigns or renounces his authority. Warned that the threat of this litigation might cause mandataries to abandon their principals, the committee chose to require that the mandatory give notice to someone else when the manda-

tary "has reasonable grounds to believe that the principal lacks capacity."¹⁰

Lastly, one matter that the committee considered important is not addressed by this legislation. Some courts have imposed a jurisprudential duty of loyalty in a principal-mandate relationship.¹¹ The committee wanted to codify this duty. Although the Council of the Law Institute agreed with the committee's suggestion, the Council chose to refer this substantive addition to the general laws of mandate in the Civil Code to the Law Institute's standing Committee on Mandate.

Act 356 will by no means solve all of the problems associated with mandataries executing mandates from persons no longer able to supervise them. It does not make a dishonest person honest. It simply makes available a tool that can be used to protect the property of persons who need this protection without intruding into the privacy of persons who do not.

FOOTNOTES

1. Uniform Power of Attorney Act §116 (2006).
2. La. Civ.C. art. 2989 (1998).
3. La. Civ.C. art. 3026 (1998).
4. La. Civ.C. art. 2996 (1998).
5. La. Civ.C. art. 2997 (2001).
6. La. Civ.C. art. 3003 (1998).
7. La. R.S. 14:93.4 (1999).
8. La. Civ.C. art. 3851 D. (2014).
9. La. Civ.C. art. 3853 (2014).
10. La. Civ.C. art. 3029 (2014).
11. *Assunto v. Coleman*, 158 La. 537, 540 (1925), ("an agent owes the utmost fidelity to his principal . . .").

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